1975

Utah v. Keith L. Moosman : Brief of Appellant

Utah Supreme Court

Jack W. Kunkler; Salt Lake Legal Defender Association; Attorney for Appellant.
Vernon B. Romney; Attorney General; Attorneys for Respondent.

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, Plaintiff-Respondent vs. KEITH L. MOOSMAN Defendant-Appellant	:	Case No. 13891

BRIEF OF APPELLANT

Appeal from a jury trial verdict and judgement rendered against the defendant-appellant in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Jay E. Banks, Judge, presiding.

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Keith L. Moosman, appeals from a judgement and sentence entered against him in the Third Judicial District Court in and for Salt Lake County, State of Utah.

DISPOSITION IN THE LOWER COURT

On September 19 and 23, 1974 the defendant-appellant was tried to a jury before the Honorable Jay E. Banks and found guilty of the offense of Unlawful Distribution of a Controlled Substance for Value.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of his conviction and a remand to the Third District Court for a new trial.

STATEMENT OF THE FACTS

Prior to trial the appellant took a polygraph examination which cleared him of the offense.

On July 31st, following the polygraph examination the appellant moved the court for a continuance in order that he might have a hearing to determine the admissibility of the results of the polygraph examination (R-11). The court granted the appellant's motion, continued the case and ordered that the question of the admissibility of the results of the polygraph examination be determined prior to trial (R-12). On August 9, 1974 the State was granted a continuance until September 19, 1974 (R-14).

In late August the appellant's witness necessary for qualification of the polygraph, Dr. David C. Raskin, left the State of Utah to Reside in Vancover B. C. On September 13, 1974 the appellant moved the court to either order the State to bear the travel expenses for Dr. Raskin to come to Salt Lake City to testify in behalf of the appellant (R-199) , or in the alternative continue the case until October 28, 1975 at which time the witness would be in Salt Lake City on his own accord and available without cost to the State (R-201, 203). The Motion was denied (R-205) and the appellant was tried to a jury on September 19 and 23, 1974 for the offense of Unlawful Distribution for Value of the Controlled Substance Marijuana to the State's Chief witness, Richard Suarez.

The State's chief witness, Richard Suarez testified that on January 5, 1974 (R-74) he was employed as a Salt Lake County Deputy Sheriff (R-74) working as an undercover narcotics agent (R-75). Officer Suarez testified further that on that date he went with Johny Patterson (R-75) to 669 South Fourth East and purchased suspected marijuana from the defendant-appellant for Ten Dollars (R-75).

Officer Suarez testified that Emily Fillmore was present in the room while the transaction between himself and Mr. Moosman occurred (R-89).

Officer Suarez further testified that later that night he gave the suspected marijuana to Officer Ralph Tolman (R-76).

Officer Ralp Tolman testified that after receiving the suspected marijuana from Officer Suarez (R-100) he locked it in his evidenc locker (R-101) until he took it to chemist Lynn Kenison on June 18, 1974 (R-101).

Lynn Kenison testified that he analysed the substance given him by Officer Tolman on January 18, 1975 (R-106) and found it to be marijuana (R-109). Defense witness Emily Fillmore testified that she had not seen the state's chief witness Officer Suarez prior to the defendants preliminary hearing (R-170) which was held April 9, 1974 (R-2) over three (3) months after the offense is alleged to have occurred on June 5, 1974 (R-4).

The defendant then testified in his own behalf that on January 5, 1974 he was living at 669 South 4th East (R-176), that he had not seen the

State's chief witness, Officer Suarez prior to his preliminary hearing (R-177) and that he had never sold drugs to Officer Suarez. (R-177). The jury found the defendant guilty (R-41) and on October 21, 1974 the court committed the defendant to prison for the indeterminate term as provided for by law (R-43).

ARGUMENT

POINT I

THE COURTS DENIAL OF THE APPELLANTS MOTION TO EITHER PAY NECESSARY TRAVEL EXPENSES FOR ATTENDANCE OF AN OUT OF STATE WITNESS CRITICAL TO APPELLANTS DEFENSE OR IN THE ALTERNATIVE CONTINUE HIS TRIAL DATE SIX WEEKS AT WHICH TIME THE REQUIRED WITNESS WOULD BE IN SALT LAKE CITY AND AVAILABLE TO THE APPELLANT WITH OUT COST PREVENTED THE APPELLANT IN PUTTING ON HIS DEFENSE TO SUCH A DEGREE THAT HE WAS DENIED DUE PROCESS OF LAW.

In the case at bar there were only two critical witnesses. One was a Salt Lake County Deputy Sheriff who testified that the appellant committed the crime. The other critical witness was the appellant who testified that he did not commit the crime. The jury had only one question to consider: that is simply put who was telling the truth. Therefore, evidence that the appellant had been truthful when he told a polygraph operator that he had not committed the offense and had not even met the state's chief witness prior to his preliminary hearing was unquestionably relevant, material and critical to his defense. It then follows that evidence presented to establish that the reliability of the polygraph as a truth detecting device is sufficient such that the examiners conclusions should be presented to the jury is paramount.

In this regard the defense counsel had moved the court to either order the county to pay the travel expenses to provide the appellant the testimony of the only available recognized authority on the operation of the polygraph (R-200) or in the alternative continue the trial six weeks until the required witness would be in Salt Lake City of his own accord and hence available without cost (R-201).

The appellant was at the time indigent and unable to provide the required travel expenses himself (R-201).

All witnesses of the state were state employees (R-201) and hence the states case could not have been prejudicial by a continuance of six weeks.

There is no question that a defendant in a criminal proceeding has constitutional guarantees extended him by the Sixth Amendment to the United States Constitution and Section 12 of Article I of the Utah State Constitution to be represented by counsel and compell attendance of witnesses. In Washington v. Texas 388 U. 314, 18 L Ed. 2d 1019 87 S. Ct. 1920 (1967) the Supreme Court in reversing a murder conviction held that compulsory process for obtaining witnesses in his favor was so fundamental that due process of law demanded it from the states. The court stated at 18 L Ed. 2d 1023

> "Just as an accused has the right to confront the prosecution's witness for the purpose of challenging their testimony, he has the right to present his own witness to establish a defense. This

right is a fundamental element of due process of law."

The United States Supreme Court held that the United States Constitution requires states to furnish counsel at states expense to indigent defendants charged with a crime, Gideon v. Wainwright 372 U.S. 335, 9 L Ed 2d 799, 83 S. Ct. 792 (1963), Argersinger v. Hamlin, 407 U.S. 25, 32 L. Ed. 530, 92 S. Ct. 2006 (1972). As the court so adequately stated in Gideon at 805 L Ed. 2d 9

> "Reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth."

Equaly obvious is the hopeless predicament of one who is too poor to be in a position to pay travel expenses necessary to obtain the testimony of his critical witness.

It follows from Washington v. Texas supra and Argersinger v. Hamlin, supra that the Fourteenth Amendment to the United States Constitution required the state to pay travel expenses to assure attendance of the defendants necessary witnesses. Further to assure Utahn's that the quality of their defense in criminal matters will not be measured by the size of their bank accounts the Utah Legislation in 1965 passed Section 77-64-1 Utah Code Annotated, 1953 as amended. Subsection (3) of the statute requires counties to provide indigent defendants

"investigatory and other facilities necessary for a complete defense." Certainly making available to the appellant in the case at bar the witness necessary to qualify the polygraph examination results for admission to the jury where the examination results exculpates the appellant is within this statute.

C O N C L U S I O N

The trial courts refusal to provide the appellant the necessary testimony of his critical defense witness requires reversal of his conviction.

Respectfully submitted,

JACK W. KUNKLER